PT GUNUNG MADU PLANTATIONS v. MUHAMMAD JIMMY GOH MASHUN

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
IDRUS HARUN JCA
YEOH WEE SIAM J
[CIVIL APPEAL NO: W-02(IM)(NCVC)-317-02-2017]
20 DECEMBER 2017

CIVIL PROCEDURE: *Forum conveniens – Proper forum for legal action – Action by Indonesian company against an Indonesian citizen and several Malaysian citizens – Whether High Court has extra-territorial jurisdiction in cases where foreigners are sued as co-defendants with local residents – Indonesian citizen approved unauthorised payments without Indonesian company's authorisation to Malaysian citizens – Whether Indonesian company's cause of action against Malaysian citizens arose within jurisdiction of Malaysia – Whether notice of writ out of jurisdiction permissible – Whether manifestly unjust to confine Indonesian company to remedies in Indonesia – Whether Indonesian court a suitable or appropriate forum to adjudicate Indonesian company's claims – Whether Malaysian High Court seized with jurisdiction – Whether Malaysian court forum conveniens – Whether Indonesian company sufficiently satisfied essential requirements of s. 23(1) of Courts of Judicature Act 1964 – Rules of Court 2012, O. 11 rr. 1(1)(H), (J), O. 12 r. 10(1) & (2)*

CIVIL PROCEDURE: *Jurisdiction – High Court – Action by Indonesian company against an Indonesian citizen and several Malaysian citizens – Whether High Court has extra-territorial jurisdiction in cases where foreigners are sued as co-defendants with local residents – Indonesian citizen approved unauthorised payments without Indonesian company's authorisation to Malaysian citizens – Whether Indonesian company's cause of action against Malaysian citizens arose within jurisdiction of Malaysia – Whether notice of writ out of jurisdiction permissible – Whether manifestly unjust to confine Indonesian company to remedies in Indonesia – Whether Indonesian court a suitable or appropriate forum to adjudicate Indonesian company's claims – Whether Malaysian High Court seized with jurisdiction – Whether Malaysian court forum conveniens – Whether Indonesian company sufficiently satisfied essential requirements of s. 23(1) of Courts of Judicature Act 1964 – Rules of Court 2012, O. 11 rr. 1(1)(H), (J), O. 12 r. 10(1) & (2)*

The appellant, a Jakarta-domiciled company and the respondent, an Indonesian citizen residing in Jakarta, were responsible for the business management, operations and running of the appellant. The second to eighth defendants, the respondent's relatives, were Malaysian citizens residing in Malaysia. Essentially, the appellant's claim against the respondent in this action before the High Court was with respect to the appellant's monies, approximately IDR 600 billion, which were allegedly paid out by the

respondent wrongfully and without authority, approval or consent of the appellant to the second to eighth defendants, who were said to have received the monies knowing that it had been paid to them in breach of the respondent's duties to the appellant (unauthorised payments). The appellant's causes of action against the respondent was premised on breach of duties, fraud, breach of trust and conspiracy to defraud whereas the causes of action against the second to eighth defendants were predicated on torts of knowing receipt, fraud, conspiracy to defraud and constructive trust. The appellant had also filed a legal action in Indonesia against the respondent which action it was alleged by the respondent, was similar to the instant action. The respondent filed a notice of application pursuant to O. 12 r. 10(1)(a), (b), (c) and (g) and (2) to (5) of the Rules of Court 2012 ('RC 2012'), seeking, *inter alia*, a declaration that the High Court had no jurisdiction over the respondent in respect of the subject matter of the claim or the relief or remedy sought in this action, an order that all further proceedings be stayed on the basis that Malaysia was not the proper forum for the dispute in this action and an order that the writ of summons and concurrent writ of summons and statement of claim as well as the service of these cause papers on the respondent be set aside. The second to eighth defendants also filed their application seeking similar reliefs from the High Court. The High Court Judge allowed the respondent's application declaring that the Malaysian courts lacked jurisdiction and was not *forum conveniens* to try the civil suit against the respondent but dismissed the second to eighth defendant's application holding that the Malaysian court could exercise jurisdiction and was the proper *forum conveniens* to try the civil suit against them. The appellant appealed against the High Court decision. The second to eighth defendants too filed their separate appeal to the court. The issue that arose was whether the High Court was seised with jurisdiction to hear and try the appellant's claim against the respondent as well as the second to eighth defendant.

Held (allowing appellant's appeal; dismissing second to eighth defendants' appeal)

Per Idris Harun JCA delivering the judgment of the court:

(1) Section 23(1)(b) of the Courts of Judicature Act 1964 ('CJA 1964') merely requires one of the several defendants to be within the jurisdiction of the High Court and if that requirement is fulfilled, that would suffice and the Malaysian court should therefore have the jurisdiction to adjudicate over the dispute. Section 23(1)(b) of the CJA 1964 plainly provides extra-territorial jurisdiction to the High Court in cases where foreigners are sued as co-defendants with local residents. (para 7)

(2) The second to eighth defendants had received monies belonging to the appellant and a large portion of the monies received by them were in fact received into bank accounts opened and maintained in Malaysia. Thus,

the appellant's causes of action against the defendants would have arisen within the jurisdiction of the Malaysian court when the said sums of monies were received by the second to eighth defendants in Malaysia. It followed therefore that the requirement in s. 23(1)(c) was fulfilled. (para 8)

(3) Further, one of the reliefs sought by the appellant in its action was for a tracing order of the appellant's monies received by the second to eighth defendants in the said Malaysian bank accounts, which would inevitably require the appellant to obtain and collate relevant documentary evidence in Malaysia. Thus, apart from para (a) of s. 23(1) of the CJA 1964, paras. (b) and (c) thereof equally applied to this case. The appellant's claim had sufficiently satisfied the essential requirements of s. 23(1) of CJA 1964 and consequently the High Court in Malaysia was indeed seised with the jurisdiction to hear and try the appellant's claims. (paras 8 & 11)

(4) The respondent had approved the unauthorised payments without authorisation or knowledge of the Board of Directors, the Board of Commissioners or the shareholders of the appellant to various individuals and companies in Indonesia, Malaysia or Australia that were connected to the respondent, including the second to eighth defendants who resided in Malaysia. The appellant's action against the second to eighth defendants and the respondent could be said to have been founded upon a tort committed within the jurisdiction of the Malaysian court, thus satisfying O. 11 r. 1(1)(H) of the RC 2012. (para 15)

(5) The second to eighth defendants were parties within the jurisdiction of the High Court *qua* recipients of portions of the unauthorised payments which were approved by the respondent. The action against the second to eighth defendants were properly brought against them and they were duly served within the jurisdiction. Although the respondent was based in Jakarta, Indonesia, but he having approved the unauthorised payments to the second to eighth defendants there, was a necessary and a proper party to the present proceedings in Malaysia and accordingly, the condition stipulated in O. 11 r. 1(1)(J) had also been fulfilled. The High Court was correct in granting the order allowing the issuance and service of the concurrent writ of summons and notice of the concurrent writ of summons to be served out of the jurisdiction. The present action fell within the categories of cases where service of a notice of a writ out of jurisdiction was permissible, with the leave of the court. The appellant had fulfilled the requirements under O. 11 r. 1 of the RC 2012. (paras 16 & 18)

(6) There was a clear difference between the present action and the law suit in Indonesia. The appellant's claims in the instant action insofar as it was against the second to eighth defendants were not only premised upon causes of action or facts founded or arising in Indonesia. The

A appellant's claims against the second to eighth defendants were for knowing receipt, fraud, conspiracy to defraud and constructive trust. Distinct from the above, the appellant's claims against the respondent in the Indonesian suit were for breach of duties, fraud, breach of trust and conspiracy to defraud. Even if the appellant's claims against the
B respondent were premised upon the respondent's obligations and duties to the appellant under the Indonesian law, the High Court could and may still seise jurisdiction to hear and try the appellant's claims. Moreover, the appellant's claims against the respondent for fraud and conspiracy to defraud were interlinked and connected with the
C appellant's claim against the second to eighth defendants. (para 21)

(7) The Indonesian law only applied in respect of the respondent and his contractual and implied duties that were owed to the appellant which could also be determined by the Malaysian court applying the Indonesian law. It would be manifestly unjust to confine the appellant
D to the remedies in Indonesia. It was thus apt under the circumstances that Malaysia was *forum conveniens vis-a-vis* the appellant's claims against the defendants including the respondent. The Indonesian court was not a more suitable or appropriate forum to adjudicate the appellant's claim as pleaded herein, contrary to the respondent's allegations. The
E respondent had failed to establish that the Indonesian court was the more appropriate forum. Accordingly, the appropriate and natural forum to try and dispute this case was the Malaysian court. (paras 27 & 28)

Bahasa Malaysia *Headnotes*

F Perayu, sebuah syarikat di Jakarta, dan responden, seorang warganegara Indonesia yang bermastautin di Jakarta, bertanggungjawab untuk pengurusan perniagaan dan operasi perayu. Defendan kedua hingga kelapan, saudara mara responden, adalah warganegara Malaysia yang bermastautin di Malaysia. Pada dasarnya, tuntutan perayu terhadap responden dalam tindakan ini di Mahkamah Tinggi adalah berkenaan wang perayu, iaitu IDR
G 600 bilion, yang didakwa dibayar oleh responden secara salah dan tanpa kuasa, kelulusan atau persetujuan perayu kepada defendan kedua hingga kelapan, yang dikatakan menerima wang tersebut dengan pengetahuan bahawa ia telah dibayar kepada mereka dalam pelanggaran kewajipan responden kepada perayu (pembayaran tanpa kebenaran). Kausa tindakan
H perayu terhadap responden berdasarkan pelanggaran kewajipan, penipuan, pelanggaran amanah dan konspirasi untuk menipu dan kausa tindakan terhadap defendan kedua hingga kelapan berdasarkan pada tort mengetahui penerimaan, penipuan, konspirasi untuk menipu dan amanah konstruktif. Perayu juga telah memfailkan tindakan undang-undang di Indonesia terhadap
I responden yang didakwa responden adalah sama dengan tindakan ini. Responden memfailkan notis permohonan menurut A. 12 k. 10(1)(a), (b), (c) dan (g) dan (2) hingga (5) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012), menuntut, antara lain, pengisytiharan bahawa Mahkamah Tinggi tidak

mempunyai bidang kuasa ke atas responden berhubungan dengan perkara tuntutan atau relif serta remedi yang dituntut dalam tindakan ini, satu perintah bahawa segala prosiding ditangguhkan atas dasar bahawa Malaysia bukan forum yang sesuai untuk pertikaian dalam tindakan ini dan satu perintah bahawa writ saman dan writ saman serentak dan penyataan tuntutan serta penyerahan kertas-kertas kausa ke atas responden diketepikan. Defendan kedua hingga kelapan juga memfailkan permohonan mereka menuntut relif yang sama dari Mahkamah Tinggi. Hakim Mahkamah Tinggi membenarkan permohonan responden mengisytiharkan bahawa mahkamah Malaysia tidak mempunyai bidang kuasa dan bukan *forum conveniens* untuk membicarakan guaman sivil terhadap responden tetapi menolak permohonan defendan kedua hingga kelapan dengan memutuskan bahawa mahkamah Malaysia boleh melaksanakan bidang kuasa dan adalah *forum conveniens* yang sesuai untuk membicarakan guaman sivil terhadap mereka. Perayu merayu terhadap keputusan Mahkamah Tinggi. Defendan kedua hingga kelapan juga memfailkan rayuan masing-masing ke mahkamah. Isu yang timbul adalah sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar dan membicarakan tuntutan perayu terhadap responden dan defendan kedua hingga kelapan.

Diputuskan (membenarkan rayuan perayu; menolak rayuan defendan kedua hingga kelapan)
Oleh Idris Harun HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 23(1)(b) Akta Mahkamah Kehakiman 1964 ('AMK 1964') hanya memerlukan salah seorang defendan untuk berada dalam bidang kuasa Mahkamah Tinggi dan jika keperluan itu dipenuhi, itu adalah memadai dan mahkamah Malaysia dengan itu harus mempunyai bidang kuasa untuk mengadjudikasikan pertikaian tersebut. Seksyen 23(1)(b) AMK 1964 dengan jelasnya memperuntukkan bidang kuasa wilayah tambahan kepada Mahkamah Tinggi dalam kes-kes di mana rakyat asing disaman sebagai defendan bersama dengan penduduk-penduduk tempatan.

(2) Defendan kedua hingga kelapan telah menerima wang milik perayu dan sebahagian besar wang yang diterima mereka telah diterima dalam akaun bank yang dibuka dan disenggarakan di Malaysia. Oleh itu, kausa tindakan perayu terhadap defendan timbul dalam lingkungan bidang kuasa mahkamah Malaysia apabila jumlah wang tersebut diterima oleh defendan kedua hingga kelapan di Malaysia. Diikuti bahawa keperluan s. 23(1)(c) dipenuhi.

(3) Selanjutnya, salah satu relif yang dituntut oleh perayu dalam tindakan guamannya adalah perintah pengesanan wang perayu yang diterima oleh defendan kedua hingga kelapan dalam akaun bank tersebut di Malaysia, yang mana pasti akan memerlukan perayu memperoleh dan menyusun

bukti dokumentasi yang relevan di Malaysia. Oleh itu, selain daripada perenggan (a) s. 23(1) AMK 1964, perenggan (b) dan (c) juga sama digunakan dalam kes ini. Tuntutan perayu telah cukup memenuhi keperluan penting s. 23(1) AMK 1964 dan akibatnya Mahkamah Tinggi di Malaysia sememangnya mempunyai bidang kuasa untuk mendengar dan membicarakan tuntutan perayu.

(4) Responden telah meluluskan pembayaran tanpa kebenaran atau pengetahuan Lembaga Pengarah, Lembaga Pesuruhjaya atau pemegang-pemegang saham perayu kepada beberapa individu dan syarikat-syarikat di Indonesia, Malaysia atau Australia yang berhubungan dengan responden, termasuk defendan kedua hingga kelapan yang bermastautin di Malaysia. Tindakan perayu terhadap defendan kedua hingga kelapan dan responden boleh dikatakan diasaskan atas satu tort yang dilakukan dalam bidang kuasa mahkamah Malaysia, oleh itu memenuhi A. 11 k. 1(1)(H) KKM 2012.

(5) Defendan kedua hingga kelapan adalah pihak-pihak dalam bidang kuasa Mahkamah Tinggi iaitu penerima sanggup bahagian-bahagian pembayaran yang tidak dibenarkan yang telah diluluskan oleh responden. Tindakan terhadap defendan kedua hingga kelapan telah dengan betul dibawa terhadap mereka dan penyerahan dibuat sewajarnya dalam bidang kuasa. Walaupun responden bermastautin di Jakarta, Indonesia, tetapi kerana dia telah meluluskan pembayaran tidak dibenarkan kepada defendan kedua hingga kelapan di sana, dia adalah pihak yang perlu dan sesuai dalam prosiding ini di Malaysia dan dengan itu, syarat yang ditetapkan dalam A. 11 k. 1(1)(J) juga dipenuhi. Mahkamah Tinggi betul dalam memberikan perintah membenarkan pengeluaran dan penyerahan writ saman serentak dan notis writ saman serentak untuk diserahkan di luar bidang kuasa. Tindakan ini terangkum dalam kategori kes-kes di mana penyerahan notis writ di luar bidang kuasa adalah dibenarkan, tanpa kebenaran mahkamah. Perayu telah memenuhi keperluan-keperluan bawah A. 11 k. 1 KKM 2012.

(6) Terdapat perbezaan yang jelas antara tindakan ini dan guaman undang-undang di Indonesia. Tuntutan-tuntutan perayu dalam tindakan ini terhadap defendan kedua hingga kelapan bukan hanya berdasarkan kausa tindakan atau fakta yang timbul di Indonesia. Tuntutan-tuntutan perayu terhadap defendan kedua hingga kelapan adalah untuk penerimaan berpengetahuan, menipu, konspirasi untuk menipu dan amanah konstruktif. Berbeza dari yang atas, tuntutan-tuntutan perayu terhadap responden dalam guaman Indonesia adalah untuk pelanggaran kewajipan, penipuan, pelanggaran amanah dan konspirasi untuk menipu. Walaupun tuntutan perayu terhadap responden berdasarkan obligasi dan kewajipan responden kepada perayu bawah undang-undang Indonesia, Mahkamah Tinggi boleh mempunyai bidang kuasa untuk mendengar

dan membicara tuntutan-tuntutan perayu. Tambahan pula, tuntutan-tuntutan perayu terhadap responden untuk penipuan dan konspirasi untuk menipu adalah saling berkaitan dan berhubungan dengan tuntutan perayu terhadap defendan kedua hingga kelapan.

(7) Undang-undang Indonesia hanya dipakai berhubungan responden dan kewajipan kontrak dan tersirat yang terhutang kepada perayu yang boleh juga ditentukan oleh mahkamah Malaysia yang mengguna pakai undang-undang Indonesia. Dengan nyatanya, tidak adil untuk mengehadkan perayu kepada remedi di Indonesia. Adalah sesuai dengan keadaan bahawa Malaysia adalah *forum conveniens vis-a-vis* tuntutan-tuntutan perayu terhadap defendan-defendan dan termasuk responden. Mahkamah Indonesia bukan forum yang sesuai atau betul untuk mengadjudikasikan tuntutan perayu seperti yang diplidkan, bertentangan dengan dakwaan-dakwaan responden. Responden gagal membuktikan bahawa mahkamah Indonesia adalah forum yang lebih sesuai. Seterusnya, forum yang sesuai dan betul untuk membicarakan dan mempertikaikan kes ini adalah mahkamah di Malaysia.

Case(s) referred to:

Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey (The "Albaforth") [1984] 2 Lloyd's 91 LR ***(refd)***

El Ajou v. Dollar Land Holdings Plc [1994] 2 All ER 685 ***(refd)***

ISC Technology Sdn Bhd v. Premium Systems Technology Pte Ltd [2008] 7 CLJ 239 HC ***(refd)***

Kenichi Hattori & Anor v. Minoru Yamashita & Anor [2004] 1 CLJ 491 HC ***(refd)***

LNE Network Systems (Asia) Sdn Bhd v. Loi Chew Ping & Ors [2015] 3 CLJ 663 HC ***(refd)***

Malayan Banking Bhd v. The International Tin Council & Anor And Another Case [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 SC ***(refd)***

Massey and Another v. Heynes & Co and Schenker & Co [1888] 21 QBD 330 ***(refd)***

Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor [2004] 1 CLJ 810 CA ***(refd)***

Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors [2012] 8 CLJ 1005 HC ***(refd)***

Spiliada Maritime Corporation v. Consulex Ltd [1987] AC 460 ***(refd)***

Transtech Electronics Pte Ltd v. Choe Jerry And Others [1998] 1 SLR (R) 1014 ***(refd)***

United Malayan Banking Corpn Bhd v. Soo Lean Tooi & Ors [1982] 1 LNS 117 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (b), (c)

Rules of Court 2012, O. 11 r. 1(1)(H), (J), O. 12 r. 10(1)(a), (b), (c), (g), (2), (3), (4), (5)

For the appellant - Daphne Koo; M/s Rahmat Lim & Partners
For the respondent - Yee Mei Ken & Teh Soo Jin; M/s Shearn Delamore & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCVC-310-05-2016 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Idrus Harun JCA:

[1] On 27 May 2016, the appellant commenced the present action against the respondent and the second to eighth defendants in the High Court. The
B facts of the case appear sufficiently in the statement of claim in which it is pleaded that the appellant is a Jakarta-domiciled company and the respondent who is an Indonesian citizen residing in Jakarta, is responsible for the business management, operations and running of the appellant. The second to eighth defendants who are the respondent's relatives, are
C Malaysian citizens residing in Malaysia. Essentially, the appellant's claim against the respondent, *qua* the first defendant in this action before the High Court, is with respect to the appellant's monies, approximately IDR 600 billion, which were allegedly paid out by the respondent wrongfully and without authority, approval or consent of the appellant to the second to eighth defendants who were said to have received the monies knowing that
D it had been paid to them in breach of the respondent's duties to the appellant (unauthorised payments). It is noteworthy that the appellant has also filed a legal action in Indonesia against the respondent which action it is alleged by the respondent, is similar to the instant action in the court below. So far as it concerns the present action, we must necessarily highlight in this regard
E that the appellant's causes of action against the respondent are premised on breach of duties as particularised in para. 20 of the statement of claim, fraud, breach of trust and conspiracy to defraud whereas the causes of action against the second to eighth defendants are predicated on torts of knowing receipt, fraud, conspiracy to defraud and constructive trust.

F **[2]** On 10 October 2016, the respondent filed a notice of application in encl. 22 pursuant to O. 12 r. 10(1)(a), (b), (c) and (g) and (2) to (5) of the Rules of Court 2012 seeking *inter alia*, a declaration that in the circumstances of the case, the High Court has no jurisdiction over the respondent in respect of the subject matter of the claim or the relief or remedy sought in this action, an
G order that all further proceedings be stayed on the basis that Malaysia is not the proper forum for the dispute in this action and an order that the writ of summons dated 27 May 2016, concurrent writ of summons dated 14 July 2016, statement of claim dated 27 May 2016 as well as the service of these cause papers on the respondent be set aside. It is also worthy of mention that
H earlier, on 29 June 2016, the second to eighth defendants filed their application in encl. 7 seeking similar reliefs from the High Court.

[3] On 20 January 2017, the learned judge allowed the respondent's application declaring that the Malaysian courts lacked jurisdiction and was not *forum conveniens* to try the civil suit against the respondent, but dismissed
I the second to eighth defendant's application holding that the Malaysian court could exercise jurisdiction and was the proper *forum conveniens* to try the civil suit against them. The appellant appealed against the High Court's decision. The second to eighth defendants too, filed their separate appeal to this court

in Civil Appeal No: W-02(IM)(NCVC)-316-02-2017. Both appeals came up for hearing before us on 10 August 2017. We heard this appeal first and allowed it. In view of our decision, we consequently dismissed Civil Appeal No. 316.

[4] A point of importance which comes sharply into focus from this action is whether the High Court is seised with jurisdiction to hear and try the appellant's claim against the respondent as well as the second to eighth defendants. Order 12 r. 10 of the Rules of Court 2012 in this connection allows the respondent to dispute the jurisdiction of the Malaysian courts based on the grounds that the Malaysian courts lack jurisdiction and is not the *forum conveniens* to try the action. As is to be expected, the position adopted for the respondent as described in the respondent's affidavit in support and counsel's written submission is that the Malaysian courts lack jurisdiction to hear this case against the respondent the reasons being that the respondent is an Indonesian citizen, the appellant is a company incorporated in Indonesia and is governed under the laws of Indonesia, the causes of action of the appellant's claim is founded upon the respondent's purported breach of duties and trust as an employee and director of the appellant and the tort of conspiracy, if committed, the causes of action arose in Indonesia and outside the jurisdiction of the Malaysian courts, and the matters which purportedly gave rise to the causes of action took place in the office of the appellant in Jakarta, Indonesia.

[5] The law relating to the civil jurisdiction of the High Court is predicated on s. 23(1) of the Courts of Judicature Act 1964 (Act 91) which provides for circumstances under which the High Court is seised of jurisdiction. We now quote from Act 91, s. 23(1) which stipulates as follows:

> Civil jurisdiction - general
>
> 23.(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) **the cause of action arose**;
>
> (b) the **defendant or one of several defendants** resides or has his place of business;
>
> (c) **the facts on which the proceedings are based exist or are alleged to have occurred; or**
>
> (d) any land the ownership of which is disputed are situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing in the local jurisdiction of those other High Court. (emphasis added)

[6] What the above provisions mean is precisely explained in *Kenichi Hattori & Anor v. Minoru Yamashita & Anor* [2004] 1 CLJ 491 where Ramly Ali J (as His Lordship then was) said:

> It is not necessary to establish jurisdiction in respect of all the sub-paras. (a), (b), (c) and (d) above. It is sufficient if the plaintiffs can show that their action falls in any one of those sub-paragraphs.

We would, in amplification to the above clear rendition of the provisions of s. 23(1) of Act 91, add that it is also necessary, in determining whether the court has jurisdiction to adjudicate over the dispute, the court has to examine the content of the statement of claim and to test it against the provisions of s. 23(1) of Act 91. Where, by so doing, the court is satisfied that *prima facie* the High Court has jurisdiction over the dispute in the sense that such dispute or civil proceedings falls within any one of the subparagraphs in sub-s. 23(1) of Act 91, it follows that *prima facie*, the court has jurisdiction. In *ISC Technology Sdn Bhd v. Premium Systems Technology Pte Ltd* [2008] 7 CLJ 239 the High Court propounded the above proposition which we fully endorse in our judgment in this appeal.

[7] Based on the above sound proposition, it is clear to us that the Malaysian court does indeed have the jurisdiction to hear the present matter and in fact, the appellant herein satisfies more than one requirement under s. 23(1) of Act 91 in particular the requirements in subparas. (a), (b) and (c) thereof. It must be reiterated, however, that the appellant's claim needs only to fall within any one of the subparagraphs for the Malaysian courts to be seised with jurisdiction pursuant to s. 23(1) of Act 91. It is an irrefutable fact that the second to eighth defendants are Malaysian citizens and are resident within the jurisdiction of the Malaysian courts. It must be pointed out further that it matters not that the respondent himself may be outside the jurisdiction of the High Court. In this respect, it ought to be emphasised that s. 23(1)(b) of Act 91 merely requires one of the several defendants to be within the jurisdiction of the High Court and if that requirement is fulfilled, that would suffice and the Malaysian court should therefore have the jurisdiction to adjudicate over the dispute. To put it in other words, s. 23(1)(b) of Act 91 plainly provides extra-territorial jurisdiction to the High Court in cases where foreigners are sued as co-defendants with local residents. The Supreme Court in *Malayan Banking Bhd v. The International Tin Council & Anor And Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 had occasion to consider the question whether s. 23(1)(b) of Act 91 created another exception to the general rule on extra-territorial jurisdiction of our court and held that s. 23(1)(b) of Act 91 "provides extra-territorial jurisdiction to the High Court in cases where oversea foreigners are sued as co-defendants with local residents."

[8] It is apparent, having scrutinised the statement of claim, that the appellant's claims against the defendants, including the respondent in this appeal, are based on breach of duties as particularised in para. 20 of the

appellant's statement of claim, the torts of knowing receipt, constructive trust, fraud and conspiracy to defraud. These allegations are pleaded in paras. 20 to 24 of the appellant's statement of claim. We would necessarily add that the torts of knowing receipt, conspiracy to defraud and fraud allegedly committed by all of the defendants, including the respondent in this appeal, collectively have arisen and are within the jurisdiction of the Malaysian court. It is a pertinent point to consider that the appellant alleges that the second to eighth defendants received monies belonging to the appellant and a large portion of the monies received by them were in fact received into bank accounts opened and maintained in Malaysia. From these pleaded circumstances, it is patent that the appellant's causes of action against the defendants would have arisen within the jurisdiction of the Malaysian court when the said sums of monies were received by the second to eighth defendants in Malaysia. It follows therefore that the requirement in sub-para. (c) of s. 23(1) is fulfilled. In this respect, another important and indeed relevant point to consider is that one of the reliefs sought by the appellant in its action is for a tracing order of the appellant's monies received by the second to eighth defendants in the said Malaysian bank accounts, which relief if allowed, would inevitably require the appellant to obtain and collate relevant documentary evidence in Malaysia. Clearly, the facts and evidence on which the proceedings are based exist or are alleged to have occurred in Malaysia. We are consequently led to one glaring conclusion that apart from para. (a) of s. 23(1) of Act 91, paras. (b) and (c) thereof equally apply to this case.

[9] We refer in this connection to the case of *LNE Network Systems (Asia) Sdn Bhd v. Loi Chew Ping & Ors* [2015] 3 CLJ 663 which specified the ingredients for the tort of knowing receipt, constructive trust, fraud and conspiracy to defraud. For the tort of knowing receipt, the court in *LNE Network Systems (Asia) Sdn Bhd*, *supra*, referred to the case of *El Ajou v. Dollar Land Holdings Plc* [1994] 2 All ER 685 which set out the elements of knowing receipt the plaintiff was required to show as follows:

> This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; **secondly the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff**; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty. (our emphasis)

Based on the requisite three ingredients to prove tort of knowing receipt as postulated in *El Ajou*, we are here concerned with the second element of the said tort. On the facts of the present case, we are satisfied that the actual receipt of the monies by the second to eighth defendants would have been in Malaysia, when the monies were received into their Malaysian bank accounts and the monies in question are traceable in Malaysia as representing the assets of the appellant. For the tort of conspiracy to defraud, we agree

with the argument urged for the appellant that one of the ingredients that must be established is that there was an agreement to injure the appellant between two or more persons.

[10] However, at this point of time, as neither the respondent nor the second to eighth defendants have entered any defence, an important question emanating from this position is whether the appellant, for the purpose of determining whether the High Court is seised with jurisdiction to try the instant action, is required to prove the allegations raised in their pleadings. The law, so far as it relates to this question, is that the court can assume that the requisite element has been proved and that the appellant's monies had been remitted by the respondent into the respective bank accounts of the second to eighth defendants in Malaysia.

In other words, at the point of determining jurisdiction, all the allegations in the statement of claim must be presumed to be true. The decision of this court in *Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor* [2004] 1 CLJ 810 made it very clear that so far as burden of proof is concerned, it would be sufficient if the facts alleged by the plaintiff in his statement of claim are alleged to have occurred within the Malaysian court's jurisdiction to enable the court to seise itself of jurisdiction over the dispute and that at the point of determining jurisdiction, all the allegations in the statement of claim must be presumed to be true. There is no burden on the plaintiff to prove to conviction that the facts on which their action is based exist within the jurisdiction of the High Court. In *Matchplan (M) Sdn Bhd & Anor* therefore, the Court of Appeal held that the Malaysian court had jurisdiction over the respondents in England for the tort of libel that was alleged to have been committed in Malaysia.

[11] There is without question that the acts done in execution of the conspiracy not only took place in Indonesia when the monies were remitted out but also in Malaysia, when the monies were received by the second to eighth defendants. As for the tort of fraud, the same consideration stated above would equally apply. For the reasons that we have given, the upshot of our deliberations would support our conclusion that the appellant's claim has sufficiently satisfied the essential requirements of s. 23(1) of Act 91 and consequently the High Court in Malaysia is indeed seised with the jurisdiction to hear and try the appellant's claims which without a doubt have been properly brought by them. Accordingly, this case falls under s. 23(1) of Act 91. The respondent's contention that the court below has no jurisdiction over him is therefore misconceived.

[12] In this regard, we are saying in this appeal that the learned judge had clearly erred on the facts of the present case and in law when His Lordship, in para. 12 of the grounds of judgment, limited his assessment and findings to those matters relating to the fact that the respondent was an Indonesian, the appellant's cause of action against the respondent was for a breach of his contractual duties and his fiduciary duties as general manager and director

of the appellant and the appellant's claim against the respondent is for approving the payment of IDR600 billion to various parties without the knowledge or approval of the appellant's board of directors.

[13] Based on the above assessment and findings, the learned judge went on to state His Lordship's opinion as follows:

> dan mahkamah berpendapat Defendan 1 adalah melanggar peruntukan-peruntukan Undang-Undang Syarikat Liability Terhad Indonesia dan Tataurusan Pertubuhan Plaintif. Sehubungan dengan itu, Defendan 1 adalah tertakluk kepada undang-undang Indonesia.
>
> (iv) kausa tindakan terhadap Defendan 1 adalah berlaku di Indonesia. Ini adalah kerana tindakan-tindakan Defendan 1 yang didakwa oleh Plaintif sebagai melanggar kewajipan fidusiari seperti menyediakan voucher, mengeluarkan cek, pindahan wang dan sebagainya adalah dilakukan di Pejabat Plaintif atau di sekitar Indonesia.

We need only say, on this aspect, and with deference to the learned judge, that His Lordship had completely ignored the other causes of action that had been mounted against the respondent by the appellant which included fraud and conspiracy to defraud. The essential point of course is that for these various causes of action, the respondent is in our opinion a necessary or proper party, without which the appellant's causes of action would not be complete.

[14] It is pertinent to consider at this point the argument advanced on behalf of the respondent that the basis for which the appellant has filed the leave application pursuant to O. 11 r. 1(1)(H) and (J) of the Rules of Court 2012 is completely unsubstantiated and that the leave application seeking the issuance and service of the concurrent writ of summons and notice of the Concurrent of Summons should not have been granted as the High Court lacked jurisdiction to try this action for the reasons that the cause of action took place outside the jurisdiction of the Malaysian courts. The conditions stipulated in O. 11 r. 1 of the Rules of Court 2012, in particular r. 1(1)(H) and (J), as far as we have been able to discern have been satisfied by the appellant and they were entitled to file for and obtain the court order dated 1 July 2016 allowing for the issuance of the concurrent writ of summons and notice of the concurrent writ of summons and service of the same to be effected out of jurisdiction. We have no hesitation in so deciding as under O. 11 r. 1 of the Rules of Court 2012, the High Court may grant an order for service of the notice of the concurrent writ of summons out of the jurisdiction, *inter alia*, in the following cases:

> (H) if the action begun by writ is founded on a tort committed within the jurisdiction;
>
> (J) if the action begun by writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto.

[15] An important fact that we want to raise as well is that the respondent had approved the unauthorised payments without authorisation or knowledge of the board of directors, the board of commissioners or the shareholders of the appellant to various individuals and companies in Indonesia, Malaysia or Australia that were connected to the respondent, including the second to eighth defendants who resided in Malaysia. In this respect, it has been shown earlier that a large portion of the unauthorised payments were received by the second to eighth defendants in Malaysia. To this end, the appellant's action against the second to eighth defendants and the respondent could be said to have been founded upon, among other things, a tort committed within the jurisdiction of the Malaysian court, thus satisfying O. 11 r. 1(1)(H) of the Rules of Court 2012.

[16] The second to eighth defendants are parties within the jurisdiction of the High Court *qua* recipients of portions of the unauthorised payments which were approved by the respondent. The action against the second to eighth defendants are properly brought against them and they were duly served within the jurisdiction. Although the respondent is based in Jakarta, Indonesia, but he having approved the unauthorised payments to the second to eighth defendants there, we would hold without any hesitation that he is a necessary and a proper party to the present proceedings in Malaysia and accordingly, the condition stipulated in O. 11 r. 1(1)(J) has also been fulfilled. In any event, the High Court was correct in granting the order dated 1 July 2016 allowing the issuance and service of the concurrent writ of summons and notice of the concurrent writ of summons to be served out of the jurisdiction. The present action does fall within the categories of cases where service of a notice of a writ out of jurisdiction is permissible, with the leave of the court.

[17] It is important to bear in mind that the law as explained in *Malayan Banking Berhad*, *supra*, clearly shows that service is not solely the foundation of jurisdiction of our High Court for apart from O. 11 r. 1, s. 23(1)(b) of Act 91 provides extra territorial jurisdiction to the High Court in cases where foreigners are sued as co-defendants with local residents. There can be no doubt here that Parliament in s. 23(1) of Act 91 intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendant are being sued, as is in the instant action, so long as one of the several defendants resides or has his place of business within Malaysia. Section 23(1)(b) of Act 91, according to Yusuf Abdul Rashid J in *United Malayan Banking Corpn Bhd v. Soo Lean Tooi & Ors* [1982] 1 LNS 117; [1984] 1 MLJ 47, which was followed by the Supreme Court in Malayan Banking Berhad, would not have been worded so, had the intention of the Legislature been different. Should the words "or one of several defendants" in s. 23(1)(a), (b) of Act 91 be omitted, the High Court would not have jurisdiction on a person who is one of several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein.

[18] Lord Esher MR, delivering the judgment of the English Court of Appeal in *Massey and Another v. Heynes & Co and Schenker & Co* [1888] 21 QBD 330, considered the true construction of O. XI r. 1(g) which has provisions equivalent to O. 11 r. 1(1)(J) of the Rules of Court 2012 and said at p. 338:

> The question, whether a person out of the jurisdiction is a "proper party" to an action against a person who has been served within the jurisdiction, must depend on this - supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.

For the reasons which we have stated in this judgment, we are satisfied that the appellant has fulfilled the requirements under O. 11 r. 1 of the Rules of Court 2012 and therefore the respondent's argument that the appellant has failed to comply with these provisions is completely untenable and must be rejected.

[19] It is strenuously contended on behalf of the respondent that our High Court is not the proper forum to hear and adjudicate the appellant's claim against the defendants, including the respondent. We think, in considering this argument, it is legitimate to begin with an emphasis that once the appellant has demonstrated and established that the High Court is indeed seised with jurisdiction to hear the appellant's claim, the burden is then shifted to the respondent to show that there is a more natural and appropriate forum to hear the present dispute against the respondent and the second to eighth defendants. The law as explained by the House of Lords in the case of *Spiliada Maritime Corporation v. Consulex Ltd, (The Spiliada)* [1987] AC 460 is that the defendant has to show that some other forum is more appropriate before a stay of the proceedings ought to be granted. *The Spiliada*, *supra*, was followed by the High Court in *Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors* [2012] 8 CLJ 1005 which illustrates to us that once the requirement of s. 23(1) of Act 91 has been met and that consequently the High Court has jurisdiction to hear the matter, the burden then shifts to the defendant to show there is a more natural and appropriate forum elsewhere to hear the dispute. Applying the principles laid down in *Q2 Engineering*, *supra*, which we are in full agreement, the relevant factors that would have direct bearing on the issue being considered are these:

(i) whether the respective forum had a real and substantial connection with the action;

(ii) the costs of the trial;

(iii) the nature of the dispute, the legal and practical issues involved, local knowledge and the availability of witnesses and their evidence and expenses;

(iv) the place where the transaction giving rise to the litigation occurred; and

(v) ease of execution.

[20] We are told by learned counsel for the respondent that the appellant has already filed a similar legal action against the respondent in Indonesia. In this respect, we must emphasise that the Indonesian law suit that was commenced by the appellant in Indonesian is for different and separate causes of action than the present suit filed herein. In the Indonesian law suit, the second to eighth defendants in the present action are not named as defendants. The tort of conspiracy to defraud and fraud between the defendants in the instant action collectively is also not pleaded in the legal action there. The appellant, moreover, has also pleaded in the present action that the second to eighth defendants are holding the monies received by them from the appellant's funds as constructive trustees, a cause of action which is not pleaded in the Indonesian law suit. The appellant's causes of action against the respondent and the second to eighth defendants are obviously different and must be distinguished.

[21] The learned judge had failed to appreciate the clear difference between the present action and the law suit in Indonesia. The appellant's claims in the instant action insofar as it is against the second to eighth defendants are not only premised upon causes of action or facts founded or arising in Indonesia. It ought to be emphasised once again that the appellant's claims against the second to eighth defendants are for knowing receipt, fraud, conspiracy to defraud and constructive trust. Distinct from the above, the appellant's claims against the respondent in the Indonesian suit are for breach of duties as particularised in para. 20 of the appellant's statement of claim, fraud, breach of trust and conspiracy to defraud. In this respect, and even if the appellant's claims against the respondent are premised upon the respondent's obligations and duties to the appellant under Indonesian law, our High Court, for the reasons we have alluded, can and may still seise jurisdiction to hear and try the appellant's claims. Moreover, the appellant's claims against the respondent for fraud and conspiracy to defraud are interlinked and connected with the appellant's claim against the second to eighth defendants.

[22] The point of importance that we ought to consider is the fact that the torts committed by the defendants collectively have arisen and are within the jurisdiction of the High Court. May it be remembered that we have mentioned earlier in our judgment that the second to eighth defendants are all Malaysian citizens and are currently residing in Malaysia and within the jurisdiction of the High Court. The torts of conspiracy to defraud and fraud have therefore taken place in Malaysia when the second to eighth defendants conspired with the respondent to defraud the appellant the details of which have already been deliberated above and need not be repeated at this point. But suffice for us to say that by reason of the defendants' tortuous acts, the appellant's causes of action against the second to eighth defendants would

have arisen within the jurisdiction of the High Court when the sums of monies in question were received by them in Malaysia. In this respect, one of the reliefs sought by the appellant is for a tracing order of their monies received by the second to eighth defendants in the said Malaysian bank accounts. The respondent is therefore a proper, necessary and required party to establish the torts and causes of action pleaded by the appellant in the present action.

[23] With these facts before this court, we would say that despite there being two civil suits or sets of proceedings, they are not entirely the same. Even assuming that these two sets of proceedings in two different jurisdictions involve the same issues and arise from the same underlying factual matrix, they do not *ipso facto* prevent one of the actions from continuing. Needless to say, we have to have regard to the right of a party to invoke a jurisdiction available to him by the law of a particular country. This is exactly what the appellant is doing herein and we do not think we should deprive it of that right with good ground shown. To strengthen this proposition, we rely on the case of *Transtech Electronics Pte Ltd v. Choe Jerry And Others* [1998] 1 SLR (R) 1014 where in dismissing a stay application on the grounds of multiplicity of proceedings, the Singapore High Court Judge at p. 1020 had this to say:

> Whilst the courts have accepted that is undesirable in general for there to be two sets of proceedings in two different jurisdictions involving the same parties and the same issues and arising from the same underlying factual matrix, they do not *ipso facto* prevent one of those actions from continuing. They have evolved two remedies to deal with the situation depending on whether the applicant wishes to continue with the proceedings in the local or the foreign jurisdiction. To obtain either of the remedies, however, the applicant must show that his case falls within the general principles that have to be satisfied before the relief can be granted. The court has always to have regard to the right of a party to invoke a jurisdiction available to him by the law of a particular country and cannot deprive such party of that right without good ground. (paragraph 16 at p. 1020)

[24] Contrary to the respondent's position that Malaysia is not *forum conveniens*, as far as we have been able to glean from the appellant's statement of claim, their allegations against the second to eighth defendants are primarily based upon their receipt of the appellant's monies. It is without doubt that the second to eighth defendants themselves are crucial persons who will be required to testify at trial. In this respect, it must be pointed out that the second to eighth defendants, being Malaysian citizens with residential addresses in Malaysia, their testimony during cross-examination would be crucial not only to establish the appellant's claims against the second to eighth defendants, but also against the respondent. The Malaysian banks which are the receiving banks would also stand to be witnesses of the receipt of monies and are located in Malaysia. With these facts before us, to our minds, there is a good deal of substance in the argument put forward by

counsel for the appellant that the location of witnesses with respect to the appellant's claim against the second to eighth defendants are in fact situated in Malaysia and this factor should therefore be resolved in favour of Malaysia and not Indonesia. In this regard, it is worthy of mention that the appellant, having commenced the action in Malaysia, would have to establish its case against the defendants here, including the respondent and would therefore be required to bring its witnesses, which would include the appellant's board of directors, the board of commissioners or the shareholders and documents to Malaysia to establish its claim against the defendants and the respondent. On the contrary, it would be difficult to compel the second to eighth defendants as well as the Malaysian banks to attend the court in Indonesia to stand as witnesses.

[25] Moreover, the evidence and documents to show the receipt of the monies by the second to eighth defendants into the Malaysian bank accounts are also within the jurisdiction of the High Court and are more easily compelled to be produced here than in Indonesia. In the event that the appellant succeeds in its relief for tracing, the Malaysian banks will be required to adduce documentary evidence to show the trail of the appellant's monies and this evidence would be more easily compelled to be produced here than in Indonesia. This factor therefore should lean in favour of the Malaysian courts being the forum convenience to hear the case.

[26] The remaining point in the contention of the respondent concerns his argument that the facts and purported dispute arose in Indonesia. It would be useful to remember that the appellant's causes of action against the respondent and the second to eighth defendants are different. It is contended for the appellant that, even if the appellant's claim against the respondent is premised upon the respondent's obligations and duties to the appellant under Indonesian law, the appellant's claims against the second to eighth defendants, and including the respondent, are for the tortuous acts committed by the defendants which have arisen within Malaysia when the second to eighth defendants were in receipt of the appellant's monies in Malaysia. The High Court therefore has jurisdiction on the basis that the alleged tort had been committed within the jurisdiction of the High Court. On the facts of the present case, we accept the above submission and in our judgment, the High Court so having jurisdiction is the most appropriate court or the natural forum to try the claim. In this respect, we rely upon the English Court of Appeal case *Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey (The "Albaforth")* [1984] 2 Lloyd's LR 91 at p. 96 which held that:

> ... where it is held that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that the conclusion is one founded on the basis that the Court, so having jurisdiction is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that

basis must also be the natural forum for the trial of action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum.

[27] It ought to be emphasised that Indonesian law applies only in respect of the respondent and his contractual and implied duties that are owed to the appellant which can also be determined by the Malaysian court applying Indonesian law. In the event, based on all the aforesaid factors, it would be manifestly unjust to confine the appellant to the remedies in Indonesia. It is thus apt under the circumstances that Malaysia is *forum conveniens vis-à-vis* the appellant's claims against the defendants including the respondent. We agree with the appellant's contention that the Indonesian Court is not a more suitable or appropriate forum to adjudicate the appellant's claim as pleaded herein, contrary to the respondents' allegations. It is also necessary at this point to emphasise that the respondent and the second to eighth defendants are required to show that the alternative forum must be more clearly appropriate than the Malaysian court and if all factors or connections pointing to both jurisdictions are equal we would endorse the High Court's decision in *Q2 Engineering* to hold that the stay must be dismissed as the respondent has failed to establish that the Indonesian court is the more appropriate forum. The learned judge, with respect, had clearly erred in fact and in law when His Lordship had concluded that the witnesses and documents were in the appellant's office, in Indonesian Banks and in Indonesia and therefore the *forum conveniens* is Indonesia. The learned judge had also erroneously found that the High Court had no sufficient jurisdiction because there was a duplicate claim made by the appellant against the respondent in the court of Indonesia.

[28] For the reasons that we have already indicated, we find no difficulty whatsoever in holding on the strength of the facts gleaned from the appellant's pleadings and the long established legal principles that the instant application under consideration in this appeal is wholly unmeritorious and that on the contrary this case is eminently one which we can safely say, is genuinely covered by s. 23(1)(a), (b) and (c) of Act 91. Accordingly, the appropriate and natural forum to try the dispute in this case is the Malaysian court. That being the case, we allow this appeal and set aside the order of the learned judge made on 20 January 2017. We award costs of RM10,000 to the appellant, subject to payment of the allocator fee. At this point, we turn to consider appeal no. 316 wherein the appellants are the second to eighth defendants in the court below. Learned counsel for the appellants, following our decision in the present appeal, had intimated to us that they left it to us to decide on appeal no. 316, and as we have stated at the beginning of this judgment, the said appeal, for the same reasons that we have given in this appeal, is dismissed with costs of RM10,000 awarded to the respondent, subject to payment of the allocator fee.